

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
VAUGHN LEROY MILBURN,)	Case No. 96-20046
)	
)	
Debtor.)	MEMORANDUM OF
DECISION)	and ORDER
)	
_____)	

Kenneth L. Anderson, Lewiston, Idaho, for Debtor.

C. Barry Zimmerman, Coeur d'Alene, Idaho, Chapter 13 Trustee.

The Debtor asks the Court to approve a modification of a confirmed plan or, alternatively, to grant a hardship discharge. Creditors affected by the requested relief have expressed neither objection nor preference. The Court concludes that modification is unavailable in the manner requested, but that the alternative motion for hardship discharge may be granted.

BACKGROUND

The petition for relief in this chapter 13 case was originally filed in January, 1996. The Debtor filed an amended chapter 13 plan in April, 1997 and that plan was confirmed by Order of the Court entered May 28, 1997.

The amended plan acknowledged that certain payments (totaling \$3,796.49) had been made to the Trustee through April 1997 and required the Debtor to make 43 additional monthly payments of \$285.00 each.¹

In March 1999, the Trustee filed a motion to dismiss under § 1307(c) based upon a delinquency of \$570.00 in plan payments. In response to this motion the Debtor in June filed an “Alternative Motion to Modify Chapter 13 Plan or for Discharge Pursuant to 11 U.S.C. § 1328(b), and Notice of Hearing” (hereafter the “Debtor’s Motion”). The Debtor’s modification request seeks:

1. To shorten the term of the chapter 13 plan to what the Debtor’s counsel characterizes as “time served” (i.e., the actual period of time from filing to the date of the Debtor’s Motion);
2. That any arrearage in payments due the Trustee be forgiven; and
3. That additional attorney’s fees be awarded the Debtor’s counsel in the amount of \$350.00.

¹ It seems as if this proposal, covering 59 months, was designed to fund the plan within the 60 month maximum term of § 1322(d).

The Debtor's Motion was served on June 7 on all creditors and parties in interest. No parties objected, nor did any creditors appear in opposition at the time set for hearing.

After hearing the submissions of the Debtor and Trustee, the Court took the matter under advisement.

DISCUSSION

This Debtor filed for relief in January, 1996 but did not confirm his chapter 13 plan until May of the following year, some sixteen months later. The plan that was confirmed promised creditors an additional 43 payments of \$285.00 each. Yet instead of 43 additional payments, the Debtor under the proposed modification will have made something in the range of 24 payments, (i.e., from May 1997 to July 1999 less at the least two missed monthly payments which triggered the Trustee's motion to dismiss).²

The confirmed plan also treated the claims of two creditors, secured by liens in motor vehicles, under the "cramdown" provisions of § 1325(a)(5)(B). The plan set the values of the allowed secured claims at \$7,568.96 for WFS Financial and \$373.78 for Don Kohler (Sunshine Motors), and required payment of these amounts over the life of the plan in "equal monthly installments." At hearing on the Debtor's Motion, the Debtor's counsel advised, in response to the Court's inquiry, that the benefits of cramdown were sought notwithstanding the modification.³

² \$3,796.49 plus 24 payments of \$285.00 equals \$9,636.49. The confirmed plan required a total of \$16,051.49.

³ The Court must conclude that at least the larger of the two allowed secured claims is not fully paid. The plan provided that these claims would be paid in "equal monthly installments" over the entire plan term. Since the proposed modification would cap funding well before the completion of those payments, it
(continued...)

Modification

Modification of a chapter 13 plan after confirmation is controlled by § 1329 which provides that the proposed modification must meet, among other things, the confirmation standards of § 1325(a). *See* § 1329(b)(1); *In re Than*, 215 B.R. 430, 434 (9th Cir. BAP 1997). Among these standards are those of § 1325(a)(5), which require that, unless a secured creditor accepts the plan or the collateral securing the claim is surrendered, the plan must provide for the retention of the creditor's lien and provide for payments, the value of which as of the effective date of the plan is not less than the allowed amount of the claim. § 1325(a)(5)(B)(i), (ii); *Barnes v. Barnes (In re Barnes)*, 32 F.3d 405, 407 (9th Cir. 1994) (compliance with the payment requirement of § 1325(a)(5)(B)(ii) is mandatory.)

Therefore, if a debtor, as here, elects to use the cramdown method to treat secured claim(s) under a modification, the plan as modified must comply with

§ 1325(a)(5)(B)(ii) otherwise approval of the modification cannot be granted.

The modification here doesn't do so, since it proposes ceasing payments to the

³(...continued)

appears evident that WFS has yet to be fully paid. Kohler may have been paid since the plan allowed the Trustee to accelerate payments on allowed secured claims under \$500.00.

secured creditors even though, on the assumption that the plan was being performed as written before the May 1999 defaults, these creditors will only have received a portion of the payment stream required under the confirmed plan and

§ 1325(a)(5)(B). The modification doesn't address the problem of the shortfall, and

cannot be approved. § 1329(b)(1).⁴

Hardship discharge

In the alternative, the Debtor requests that he be granted a hardship discharge under § 1328(b) which provides:

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if-

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

A debtor has the burden of showing that these three enumerated conditions are met in order for a discharge to be granted. *In re Fisher*, 91

⁴ The Debtor makes much of the fact that the “time served” is more than three years from the date of the filing of the petition, and that creditors will have received more under the plan, even as modified, than they would have received under chapter 7. While both are important points, and have to be satisfied in order for modification to be approved, they are not the only prerequisites. Section 1329(b)(1) requires that the plan as modified meet all confirmation standards under §1325(a).

I.B.C.R. 192, 193 (Bankr. D.Idaho 1991). The Debtor made an offer of proof at hearing as to the requirements of (b)(1) and (b)(2).

In regard to the requirements of § 1328(b)(3), while the present modification does not satisfy § 1329(b), there was no submission establishing that some other sort of modification would not be practicable. However, if the Debtor lacks income generating ability sufficient to meet his plan obligations and satisfies

§ 1328(b)(1), the Court will accept the implicit representation of the Debtor's counsel that a modification in compliance with § 1329 is not possible. Neither the Trustee nor any creditor resisted the request for hardship discharge, and the Court concludes that the same shall be granted.

The request for hardship discharge represents to the Court and creditors that the Debtor lacks the ability to make any further payments, including the missed payments which led the Trustee to move for dismissal under § 1307(c). Under these circumstances, the Court is not convinced that it would be appropriate to grant that portion of the Motion which seeks to require payment of additional attorneys' fees. Therefore, the application for additional compensation shall be denied.

CONCLUSION AND ORDER

The Debtor's Motion seeks to modify the confirmed plan in a manner which fails to satisfy the requirements of § 1325(a)(5)(B)(ii) and, thus, § 1329(b)(1). Therefore, the Motion in this regard is DENIED.

The Debtor's Motion alternatively requests entry of a hardship discharge under § 1328(b) and the Court finds that this request may be, and the same hereby is, GRANTED. The Clerk shall cause notice to be issued to creditors as required by Rule 4007(d).

Dated this 16th day of September, 1999.

TERRY L. MYERS
UNITED STATES BANKRUPTCY JUDGE